IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

PAT PETERSON — PETITIONER

VS. — NO. 3:95CV175-D (4:95CR019)

UNITED STATES OF AMERICA — RESPONDENT

MEMORANDUM OPINION

The motion of the petitioner, Pat Peterson, filed pursuant to 28 U.S.C. § 2255, came on for consideration by this court. On May 7, 1993, Pat Peterson pled guilty to a one count information of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. This court sentenced him on April 20, 1995, to an imprisonment term of sixty (60) months and supervised release of five (5) years. The petitioner asserts that his guilty plea in the underlying criminal action was not voluntary by reason of ineffective assistance of counsel. The court finds the petition for habeas relief not well taken and it shall be denied.

I. FAILURE TO RAISE ISSUES ON DIRECT APPEAL

The court first notes that the petitioner failed to appeal his conviction and such a failure generally results in the waiver of collaterally raised claims. See, e.g., United States v. Patten, 40 F.3d 774, 776 (5th Cir. 1994) (per curiam), cert. denied, 115 S. Ct. 2558, 132 L.Ed.2d 811 (1995). After a defendant has exhausted or waived any right to appeal, "we are entitled to presume that [the defendant] stands fairly and finally convicted." United States v. Shaid, 937 F.2d 228, 231 (5th Cir. 1991) (quoting United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)), cert. denied, 502 U.S. 1076, 112 S. Ct. 978, 117 L.Ed.2d 141 (1992). A convicted defendant can only challenge his conviction on issues of constitutional or jurisdictional magnitude after it is presumed final. Shaid, 937 F.2d at 232.

Furthermore, the Supreme Court set out a "cause and prejudice" test in Frady, 456 U.S. at 167-68, 71 L.Ed.2d at 830, that must be met before a district court will allow the petitioner to raise a claim for habeas relief that he could have raised at trial or on direct appeal. See also Shaid, 937 F.2d 228.

> A movant is barred from raising jurisdictional and constitutional claims for the first time on collateral review unless he demonstrates cause for failing to raise the issue on direct appeal and actual prejudice resulting from the error.

Patten, 40 F.3d at 776. The United States Supreme Court has recognized a single exception to the application of this "cause and prejudice" standard -- a "fundamental miscarriage of justice" coupled with the petitioner's actual innocence of the crime of which he is convicted. Schulp v. Delo, 513 U.S. ---, 115 S. Ct. 851, 130 L.Ed.2d 808 (1995); Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") (O'Connor, J.). Because Mr. Peterson has not asserted in his petition to this court that he is actually innocent of the crimes to which he pled guilty, the "fundamental miscarriage of justice" exception is not applicable.

However, the petitioner's claim is one of ineffective assistance of counsel and therefore can be properly raised for the first time in a § 2255 motion rather than on direct appeal. Patten, 40 F.3d at 776; United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir. 1992) ("[I]neffective assistance of counsel claims are obviously of constitutional magnitude and satisfy the cause and actual prejudice standard."); United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991); United States v. Casiano, 929 F.2d 1046, 1051 (5th Cir. 1991). Several other circuits, in addition to the Fifth Circuit, have held the same way. See McCleese v. United States, 75 F.3d 1174, 1178 (7th Cir. 1996) (citing cases from every circuit except the Second). The Fifth Circuit has also noted that generally a claim of ineffective assistance of counsel "cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." Pierce, 959 F.2d at 1301.

II. VOLUNTARY PLEA[1]

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[1]The constitutionality of the petitioner's conviction may only be attacked on the "voluntary and knowing nature of the plea" since any nonjurisdictional challenges have been waived. Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. Unit B 1981) (citing McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763 (1970)).

As a preliminary matter, the court addresses whether the petitioner's plea withstands due process scrutiny. Federal courts must uphold a guilty plea challenged in a habeas petition if the plea was knowing, voluntary and intelligent. James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995) (citing Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir.), cert. denied, 474 U.S. 838, 106 S. Ct. 117, 88 L.Ed.2d 95 (1985)); Bradbury v. Wainwright, 658 F.2d 1083, 1086 (5th Cir. Unit B 1981) (citing Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970)) . "If the record shows the defendant 'understood the charge and its consequences,' this Court will uphold a guilty plea as voluntary even if the trial judge failed to explain the offense." James, 56 F.3d at 666 (quoting Davis v. Butler, 825 F.2d 892, 893 (5th Cir. 1987)). The Fifth Circuit has determined that the "consequences" of a guilty plea, with regard to sentencing, "mean only that the defendant must know the maximum prison term and fine for the offense charged." Barbee v. Ruth, 678 F.2d 634, 635 (5th Cir. 1982), cert. denied, 459 U.S. 867, 103 S. Ct. 149, 74 L.Ed.2d 125 (1982). As long as Peterson understood the "'length of time he might possibly receive, he was fully aware of his plea's consequences.'" Id. (quoting Bradbury, 658 F.2d at 1087).

The petitioner asserts that his plea was involuntary because he was misinformed as to the statutory **minimum** sentence he could receive. The Constitution only requires that the defendant be informed of and understand the consequences of his plea -- the **maximum** prison term and the fine. Ables v. Scott, 73 F.3d 591, 592-93 n.2 (5th Cir. 1996); United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990), cert. denied, 498 U.S. 1093, 111 S. Ct. 977, 112 L.Ed.2d 1062 (1991); United States v. Rivera, 898 F.2d 442, 447 (5th Cir. 1990). In Ables, the petitioner argued for habeas relief on the ground, among others, that the trial judge failed to advise him that his minimum punishment would be fifteen years if he was convicted as a repeat offender by the jury. Ables, 73 F.3d at 592 n.2. The Fifth Circuit noted, however, that the petitioner need only be advised of the maximum prison term and the trial judge had so informed the petitioner. Id. at 593 n.2.

The transcript of the Waiver of Indictment and Plea before the undersigned indicates that the court informed the petitioner in the case *sub judice* of the mandatory maximum sentence and fine

which could be imposed for the offense to which the petitioner pled guilty. Indeed, the court also complied with the strictures of Federal Rule of Criminal Procedure 11(c) and informed the petitioner in open court of the mandatory minimum sentence as provided by law.[2] As such, the petitioner's guilty plea meets the constitutional requirements that it be knowing, voluntary and intelligent.

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Although the petitioner's guilty plea otherwise meets constitutional due process requirements that it be voluntary, the petitioner argues that he would not have pled but for the ineffective assistance of his counsel. The test for ineffective assistance, as set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), includes two prongs which the movant must meet. See also Amos v. Scott, 61 F.3d 333, 347-48 (5th Cir.), cert. denied, 116 S. Ct. 557, 133 L.Ed.2d 458 (1995). The first is that the movant show "that counsel's performance was deficient." Strickland, 466 U.S. at 687. The Court interpreted this to mean that the movant show such performance "fell below an objective standard of reasonableness." Id. at 688. The movant must then show that such deficiency "prejudiced the defense." Id. Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. See also Lockhard v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 844, 122 L.Ed.2d 180 (1993) (movant must also show that trial result was unreliable or proceeding fundamentally unfair due to deficient performance). Finally, "a court need not address both prongs [of an ineffective assistance of counsel claim] . . ., but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Amos, 61 F.3d at 348; Pierce, 959 F.2d at 1302 ("An insufficient showing of prejudice pretermits addressing the adequacy prong.").

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[2] Rule 11(c) provides in relevant part:

> Before accepting a plea of guilty or no lo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . . .

Fed. R. Crim. P. 11(c)(1).

The court is of the opinion that the petitioner has failed to demonstrate prejudice sufficient to support habeas relief. The basis of the petitioner's argument hinges on the alleged misadvice he received from his trial counsel concerning the amount of time for which he would be incarcerated. According to petitioner, trial counsel advised him that he would probably receive only a couple of years, when in fact the statutory minimum was five (5) years for the offense in question. Petitioner stated in his affidavit to the court that if he had known that he would be in prison for a minimum of five (5) years, he would not have pled guilty.

Irrespective of whether his trial attorney misinformed petitioner as to the probable sentence which this court would impose, the petitioner was correctly apprised no less than three times of the statutory minimum sentence.[3] Thus, this court cannot say that it is "reasonably probable that but for the [alleged] misadvice of his trial counsel [petitioner] would not have pleaded guilty and would have insisted on going to trial." James v. Cain, 56 F.3d at 667 (citing Czere v. Butler, 833 F.2d 59, 63 (5th Cir. 1987)). Petitioner has failed to satisfy the second prong -- prejudice -- of the Strickland test for ineffective assistance of counsel and his petition for relief must be denied.

A separate order in accordance with this opinion shall issue this day.

THIS ___ day of June, 1996.

_____
United States District Judge

[3]The mandatory minimum sentence was set out in the Plea Agreement which the petitioner signed; it was set out in the presentence report; finally, the undersigned advised the petitioner in open court pursuant to Fed.R.Crim.Pro. 11(c) of the statutory minimum sentence and inquired as to whether the petitioner understood, to which query he responded affirmatively.

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ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255

Upon thorough review of the record in this matter, this court finds no justification for relief under § 2255. Accordingly, the court is of the opinion that the motion for relief pursuant to 28 U.S.C. § 2255 is not well taken and the same is hereby denied. Therefore, it is hereby ORDERED that:

1) the petitioner's request for relief under 28 U.S.C. § 2255 be, and it is hereby, DENIED.

2) this case is DISMISSED.

SO ORDERED this ___ day of June, 1996.

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United States District Judge